



October 11, 2023

Mr. Andrew Katsaros
Federal Trade Commission
Office of Inspector General
Room CC-5206
600 Pennsylvania Ave., NW
Washington, DC 20580

Dear General Katsaros,

The U.S. Chamber requests that the Office of Inspector General (OIG) investigate whether the FTC is in compliance with (Executive Order 12988 – Civil Justice Reform (EO or Order)). Based on public filings and media reports, there is reason to believe that the FTC is failing to comply with the Order’s directives that, prior to filing a civil complaint and throughout any litigation, federal agencies should “attempt to achieve a settlement” and “identify any type of bias on the part of the decision-makers.” These concerns constitute the type of “fraud, waste, abuse, misconduct, and mismanagement” that OIG is charged with investigating¹: the FTC’s apparent failure to comply with EO 12988 may cost taxpayers millions of dollars in litigation expenses and attorney time that could have been avoided via reasonable attempts at settlement, while its failure to resolve bias concerns undermines the agency’s law enforcement mission.

In addition, the Chamber asks OIG to investigate whether the FTC is fulfilling its responsibilities to ensure the confidentiality of nonpublic information, pursuant to the FTC Act, 15 U.S.C § 50, the Hart-Scott-Rodino Act, 15 USC 18(a)(h), and other statutes.² In several instances, there is concern that agency personnel may have leaked confidential information, or their analyses of confidential information, to the media about ongoing investigations. If this has happened, such disclosures would compromise the integrity of the Agency’s processes, unfairly damage the reputations of the subject individuals and companies, and arguably violate both federal law and basic notions of procedural fairness and due process. In its semiannual report from earlier this year, OIG itself acknowledged that the FTC has failed to develop a comprehensive strategy for safeguarding nonpublic information and records.³ Further review is now warranted.

¹ See generally FTC OIG, Special Report, at https://www.ftc.gov/system/files/ftc_gov/pdf/management-post-ftc-employment.pdf; FTC OIG, About the OIG, at <https://www.ftc.gov/office-inspector-general/what-you-need-know-about-office-inspector-general>.

² See U.S. Submission to the Organisation on Economic Co-operation and Development, *Working Party No. 3 on Co-operation and Enforcement* (Oct. 4, 2013) (“Many laws and rules at the federal level address confidentiality and privacy, requiring federal agencies to apply specific confidentiality and privacy protections for the information they receive from individuals, companies, or other governmental bodies”), at <https://www.justice.gov/atr/file/787991/download>; *Lieberman v. FTC*, 771 F.2d 32, 38 (2nd Cir. 1985) (“Congress wanted premerger information kept confidential”).

³ FTC OIG, Semiannual Report to Congress, at https://www.ftc.gov/system/files/ftc_gov/pdf/sar-69-spring-04-28-2023.pdf.



A. The FTC is Failing to Make Reasonable Efforts to Settle Litigation

Executive Order 12988 is designed to improve the operation of the justice system by giving private parties an opportunity to settle lawsuits without having to endure the costs of litigation. Specifically, the EO provides that federal agencies shall not file a complaint initiating civil litigation “without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement.” Even after filing a complaint, and throughout the litigation, an agency “shall evaluate settlement possibilities and make reasonable efforts to settle the litigation.” The Order facilitates the just and efficient resolution of civil claims, encourages the filing of only meritorious suits, and promotes fair and prompt adjudication.

Unfortunately, it appears that the FTC has been violating the letter and spirit of this Executive Order. In case after case, the FTC has filed suit without presenting settlement offers itself, and even worse, ignoring or affirmatively rejecting settlement overtures from the companies:

- *Amazon*. According to public reports, “The FTC wasn’t particularly interested in hearing about a settlement, which Amazon had offered a settlement to resolve these sort of concerns in both Europe and the UK. But here in the US, the FTC was not particularly interested.”⁴
- *Illumina*. Illumina actively sought to resolve the FTC’s concerns regarding its proposed acquisition of Grail, and the FTC’s own Administrative Law Judge later found that a standardized, long-term supply agreement offered by Illumina to its U.S. oncology customers would resolve any competitive concern, but remarkably, the FTC filed an opposition to the scheduling of a settlement conference, which never happened.⁵
- *Meta*. The FTC never offered settlement terms in the Meta-Within matter; instead, according to public reports, Chair Khan overruled the staff’s recommendation and ordered them to file a lawsuit.⁶
- *Microsoft*. Although Microsoft signaled a strong desire to address the FTC’s concerns about its Activision acquisition without litigation,⁷ the FTC declined even to discuss remedies, which have satisfied regulators in Europe and the United Kingdom.⁸

⁴ See Nylen, Bloomberg Technology, at <https://podcasts.apple.com/us/podcast/bloomberg-technology/id1611767434?i=1000626992949>.

⁵ Complaint Counsel Memorandum, at https://www.ftc.gov/system/files/documents/cases/d09401_-_complaint_counsel_s_memorandum_in_opposition_to_motion_for_conference_to_facilitate_settlement_-_public.pdf.

⁶ See Leah Nylen, *FTC’s Khan Overruled Staff*, BLOOMBERG, July 29, 2022, at <https://www.bloomberg.com/news/articles/2022-07-29/ftc-s-khan-overruled-staff-to-sue-meta-over-virtual-reality-deal#xj4y7vzkg>.

⁷ Flavia Fortes, *US FTC Still Not Interested in Microsoft-Activision Behavioral Remedies*, mlex, May 18, 2023, at <https://mlexmarketinsight.com/news/insight/us-ftc-still-not-interested-in-microsoft-activision-behavioral-remedies>.

⁸ Elena Vardon and Kim Mackrael, *Microsoft’s Activision Deal Clears Main Hurdle as U.K. Regulator Accepts Changes*, WSJ, Sept. 22, 2023, at <https://www.wsj.com/tech/microsofts-activision-deal-moves-closer-as-u-k-regulator-accepts-changes-fdb0ef45>.



This behavior appears to directly contravene the mandates set forth in Executive Order 12988. The EO directs agencies to engage in good-faith settlement talks, yet the FTC regularly refuses to do so, even as foreign competition agencies and impartial adjudicators find that reasonable remedies could resolve any genuine competitive concerns. These refusals represent a misuse of taxpayer resources. Antitrust cases can take years to resolve. Direct costs, in terms of expert fees and attorney time, can easily run into the tens of millions of dollars. Prior to embarking on a years-long quest to reshape antitrust law, spending tens of millions of taxpayer dollars in the process, the FTC should try to resolve concerns through good-faith negotiations.

Moreover, the FTC's recent lawsuits also contradict past practice -- and the best practice in complex antitrust matters. Until recently, for instance, the FTC regularly accepted contractual and behavioral remedies in non-horizontal mergers and in monopolization cases based on exclusionary conduct, provided that the remedies were easily administrable. As set forth in *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics*, the Commission accepted non-structural remedies in 100% of their challenges to non-horizontal mergers, successfully maintaining competition in the relevant market. Such an approach perhaps could have resolved some or all these recent lawsuits much more quickly, effectively, and cheaply than litigation.

B. The FTC is Failing to Identify and Resolve Concerns about Bias

The Executive Order is also designed to improve the public's confidence in the justice system by resolving concerns about bias. The EO directs all federal agencies to "review their administrative adjudicatory processes to *identify any type of bias* on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals" (emphasis added). Although directed at administrative adjudication, rather than civil litigation, this portion of the Order reinforces the importance of impartiality, and the appearance of impartiality, throughout the justice system.

Multiple cases raise concerns about the FTC's impartiality. In *Meta-Within*, Chair Khan refused to recuse herself despite critical past statements about Meta, disregarding the views of the FTC's own ethics official and later dissembling before Congress.⁹ In *Illumina-Grail*, the FTC colluded with foreign regulators to scuttle the deal.¹⁰ In *FTC v. Amazon*, the company had asked

⁹ E.g., Chamber, at <https://www.uschamber.com/finance/antitrust/ftc-a-timeline-of-an-agency-gone-rouge>.

¹⁰ See Editorial, *The FTC's Antitrust Collusion*, WSJ, Feb. 23, 2023, at <https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-grail-acquisition-a78e03d0>.



Chair Khan to recuse herself from the antitrust probes given her past, sharp criticisms of the company, which included saying that Amazon “should be broken up.”¹¹

Given these objectively legitimate concerns, the FTC’s leadership appears to be disregarding the Executive Order’s dictates to eliminate bias. This failure raises questions about the validity of the lawsuits, the refusals to engage in settlement talks, and the use of taxpayer dollars.

C. There is Reason to Believe that the FTC is Failing to Protect Nonpublic Information

Confidentiality protects both the Commission itself and the individuals and companies who are the subject of its probes. For individuals and companies, confidentiality protects their reputations and their ability to receive due process, free from taint or bias.¹² Confidentiality also insulates the Commission from charges of bias. Leaks suggest that the Commission has decided to condemn an individual or company prior to the end of the investigation and could compromise the effectiveness of its law enforcement mission. Leaks also diminish the willingness of the individuals and companies, and of third-party witnesses, to cooperate with investigations.

Despite the importance of confidentiality, recent news stories have contained considerable amounts of nonpublic information. Earlier this week, for example, the Wall Street Journal relayed sensitive, redacted details of the FTC’s complaint against Amazon.¹³ Other stories include information about the issuance of second requests, the timing of potential lawsuits, the merging parties’ responses to the Commission, and the status of timing agreements between the Commission and the merging parties.

Based on their content, the stories suggest that agency personnel have leaked sensitive material to the media. One article attributed leaked information to “an FTC official, who requested anonymity.” Other stories disclosed the Commission’s thought processes and planned response to various transactions. For example, one piece reported that the “agency’s staff attorneys [are] leaning toward suing to stop [a particular acquisition] in the next few months.” This article then described the Commission’s concerns. Another story explained the Commission’s thought processes in great detail, noting that the FTC brought suit to send a message to their counterparts abroad. Several articles divulge information known only to the Commission and investigated companies, and given the nature of the probes, it seems unlikely that the companies would have had an interest in leaking the information to the media.

¹¹ E.g., Annie Palmer and Lauren Feiner, *Amazon seeks recusal of FTC Chair Lina Khan in antitrust probes of the company*, CNBC, June 30, 2021, at <https://www.cnbc.com/2021/06/30/amazon-seeks-recusal-of-ftc-chair-lina-khan-in-antitrust-probes.html>.

¹² See generally Department of Justice Manual, Confidentiality and Media Contacts Policy 1-7.000, at <https://www.justice.gov/jm/jm-1-7000-media-relations>.

¹³ Dana Mattioli, *Amazon Used Secret ‘Project Nessie’ Algorithm to Raise Prices*, WSJ, Oct. 3, 2023, at <https://www.wsj.com/business/retail/amazon-used-secret-project-nessie-algorithm-to-raise-prices-6c593706?page=1>.



In some of these stories, agency staff are quoted as condemning private companies, outside of the judicial process. In one article, for instance, agency personnel are quoted as saying that the merging companies had violated the antitrust laws, even though the Commission ultimately decided not to sue. According to the story, “agency officials[] belie[ved] that the deal was anticompetitive . . . [and] found evidence of anticompetitive behavior that many at the agency considered damning.” All these stories raise troubling questions of fairness, due process, and improper reputational harm. The agency’s long-term effectiveness depends upon public confidence in the integrity of its investigations.

We thank you for your attention to these matters.

Sincerely,

Sean Heather
Senior Vice President
International Regulatory Affairs & Antitrust
U.S. Chamber of Commerce

cc: House Judiciary Committee
House Energy & Commerce Committee
Senate Judiciary Committee
Senate Commerce Committee
White House Counsel